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IN THE

Supreme Court of The United States

OCTOBER TERM, 1943

No. 409

TENNESSEE COAL, IRON & RAILROAD COMPANY, Et al.,

Petitioners,

vs.

MUSCODA LOCAL NO. 123, Affiliated with INTERNATIONAL UNION OF MINE, MILL, AND SMELTER WORKERS, Et al.,

Respondents.

BRIEF FOR RESPONDENTS

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BIRMINGHAM PRINTING COMPANY, BIRMINGHAM, ALA.

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Respondents.

STATEMENT OF THE CASE

The individual respondents are all underground employees in the iron mines of the petitioners. These individuals are for the most part members of unions affiliated with the C. I. O. A small number are members of unions affiliated with the A. F. of L. The case neither concerns surface employees nor does it involve any suit between coal miners and coal operators.

The specific question in this case is, "What constitutes the working time which makes up the workweek

of the underground ore mining employees of the appellants' within the meaning of Section 7, of the Fair Labor Standards Act of 1938".

The question arises on a petition for a declaratory judgment and for an injunction and upon appropriate pleadings of the defendants named in the petition.

The Declaratory Judgments Act, 28 U. S. C. A. Section 400, is applicable to "Cases of Actual Controversy".

The answer to the specific question is found in the facts of the employer-employee relationship existing between the plaintiff and its employees, who are defendants in the cause, during the period of time from October 24, 1938, the effective date of the Fair Labor Standards Act of 1938, and May 1, 1941. No question arises out of the relationship subsequent to May 1, 1941 because on that date the employer began to comply with the provisions of the Fair Labor Standards Act.

All parties are in agreement that the plaintiff was engaged in the production of goods for interstate commerce from October 24, 1938 to May 1, 1941. All parties are also in agreement that the employees of the defendant, who were named in the petition and those who later became parties defendant, were engaged in the production of goods for interstate commerce.

The plaintiff contends that it has complied with the Maximum Hours provision (29 U. S. C. A. Section 207) of the Fair Labor Standards Act of 1938 and is under no obligation to pay the defendants any other compensation than that already received. The defend-

ants contend that they were employed for a workweek longer than 44 hours during the first year from October 24, 1938, for a workweek longer than 42 hours during the second year from such date, and for a workweek longer than 40 hours after the expiration of the second year from such date until May 1, 1941 without receiving compensation for their employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which they were employed. The correct answer to these respective contentions depends upon the answer to the question, "What was the working time of the plaintiffs' employees from October 24, 1938 to May 1, 1941?"

The facts in the record give a clear cut answer to the question. The petitioners have not given a full, and complete portrayal of the facts in their statement of the case. And while the respondents are not required, by the rules of this Court to give a statement of facts, we believe that a more accurate statement will save this Court time and labor, give a clearer understanding of the case and demonstrate the correctness of the findings and opinion of the courts below.

STATEMENT OF FACTS AS TO TENNESSEE COMPANY

The operations of the Tennessee Company are substantially the same at all its iron ore mines. And the operations of the night shift are substantially the same as the day shift, hence a description of the procedure on the day shift is typical.

THE ASSEMBLY

The whistle blows at 6 A.M. Before that time the employees have been to the bath house on the company premises and changed to their working clothes. Some of them arrive at the bath house as early as 5:40 or 5:45 A.M. After changing to their working clothes, they proceed to a tally house near the mouth of the mine.

At the tally house all employees check in. They do this by turning in to the timekeeper or the mine foreman a brass check, which is furnished by the company to each employee. "He is checked in generally by the mining foreman, and his brass check is hung on the board by the mining foreman or timekeeper in there. It is lined up opposite his crew." (R. 1674). All employees must check in before going down into the mine.

In the early days the timekeeper was at the underground manloading station. In 1933 and 1934 the timekeeper was taken outside the mine and stationed at the outside tally house. (R. 797, 3215).

The company did not require the employees to be at the bath house at any particular time but did require that they be ready to ride the mantrips when they started running. The cars in the mantrip were ore cars. The mantrips ran at a particular time. The schedule operated automatically. (R. 3349). Some of the skips (mantrips) started at 6 o'clock A.M. On the average the skips began running at 6:07 A.M. "All head miners that was chose as head miners was required to be at the tally house at 6 o'clock to check in the men." (R. 2428).

One indispensable piece of equipment for all underground employees is a carbide lamp. The carbide comes in cans and a can lasts a man about two days. Hence, every two days every underground employee buys carbide from the company and he buys it at the tally house from the company timekeeper.

RECEIVING ORDERS

Not only do we find the employees checking in and picking up an indispensable item of their equipment before they board the mantrip, but we also find these employees receiving orders, directions, or instructions before they catch the mantrip. (R. 2692, 2728, 2734, 2739, 2730, 2741, 3097, 3099, 3102, 3173, 3175, 3176).

CARRYING TOOLS

It appears beyond all dispute that employees of the Tennessee Company carried various tools and necessary items of equipment with them on the mantrip from time to time.[1] A metal container was fastened on the bail of the skip for the purpose of carrying such things. (R. 2745).

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[1]Without distinguishing between the different mines, the record shows that the things carried by the men include the following: wedges (R. 1271, 2402, 2519, 2663, 2679, 2737, 3098, 3116-3117), hangers (R. 1271, 2402, 2519, 2663, 2725, 2735, 2737, 3116-3117), hooks (R. 1212, 1271), quarrying bars (R. 2663, 2694, 2746), picks (R. 2804, 3032, 3098), pick handles (R. 2804, 3098), shovels (R. 2804, 3032, 3098), shovel handles (R. 2805), rock hammers (R. 2804, 3032, 3098), hammer handles (R. 2805), Stilson wrenches (R. 2806), pipe fittings (R. 1271, 2694), pipes (R. 2685), drill valves and fittings (R. 1271, 2402), drill bits (R. 2960, 3032), drill and jackhammer steel (R. 1271, 2402, 2663, 2664, 2677, 2679, 2694, 2725, 2736, 2737, 2739, 2811, 3116-3117), hose (R. 2685, 2694), "C" hooks (R. 1212, 1271), water fittings (R. 2694).

After the men get off the mantrip at the man unloading station, they pick up other supplies near that station and carry them on their persons as they walk to the face of the seam.[2]

The carrying of the listed tools, equipment and material was not sporadic. It was a frequent occurrence up to May 1, 1941. (R. 3117).

UNDERGROUND CONVEYANCE

The ore cars in which the men rode into and out of the mines were made of steel. The floors of these steel cars were frequently covered with muck from the ore hauled in them. The cars were hauled into and out of the mine by means of cables. Rollers for the cables were suspended from the roof and constituted a danger to the men. While in these cars the men were compelled to assume crouching and cramped positions. Their bodies fitted one into the other like a rack of spoons. The roofs did not clear the top of the skip (ore car) more than a few inches for most of the length of the slopes (R. 4455).

Men had been injured getting into these skips and while riding in them.

Mr. Ewing Carter, a witness for the Tennessee Company, testified as follows:

---

[2]These supplies include fifty pound boxes of powder (R. 2808), dynamite caps (R. 2810, 2960), fuses (R. 2811-2960), oil and dope for the motors (R. 1203-1204, 1246, 2519, 2678, 2685, 2694, 2735, 2746, 2756) hitchcutters (R. 3121) and in the case of servicemen, supplies (R. 2677) required for their particular activities.

"A. Mr. Harris, I don't know exactly the nature. We have had a dozen men injured in the skip in the last 10 years, only one, a lost-time accident, from striking his head, and that was last Monday night. The others have been ankles, feet and hands, getting in and out.

"Q. Ankles, feet and hands; in other words, they jump down in the skip and turn and twist their ankles or hurt their hands?

"A. Climb out and injure their ankles getting out or someone steps on a man's hand.

"Q. And you have a man injured?

"A. Yes, sir.

"Q. And you have had men packed in so their ribs were injured?

"A. Yes. (R. 1709)"

Very often the men complained about being crowded in the skip too heavily and mashed. (R. 2490).

After the men got out of the skips at the man unloading station, they had long distances to walk, carrying the equipment, materials and supplies hereinabove listed. At all times, from the moment they entered the mine until they left the mouth of the mine at the end of the shift, they were exposed to the danger of falling rock. As they walked they had to traverse places that were wet and slippery, portions of track cluttered with ore which had fallen from the cars, and in places, to dodge, at peril of great bodily injury if they failed to do so, mine cars which would run along the same passages they were traversing. In places they had to bend over because of the closeness of the roof. In many

places, they had to be alert to keep the tools they were carrying from coming in contact with unguarded electric wires. As they walked further into the mine the air became more humid.

The mines were utterly without any kind of toilet facilities. To relieve themselves the men merely used any convenient place in the mines. This situation has lasted for years so that the odor of human sewage became perceptible at the man unloading station and grew more perceptible the deeper an employee went into the mine. Mine timbers were rotting and their oxidation was likewise adding to the unpleasant conditions under which these employees of the petitioners performed their activities and for which appellant has always refused to pay.

When the miners put down their drills and started out of the mine at the end of the shift, they had to walk under such conditions that they were wet with sweat when they arrived at the hoodlum, or man loading station. Arriving there they had to wait until the skips, owned and operated by the employer, were finished with their hauling of ore and could be used to haul the men. A representative of the Company counted them out into the skip just as they counted them into it at the mouth of the mine. That representative determined how many men could go in the skip and when it would move out. Arriving at the mouth of the mine, they went to the tally house and checked out. Their brass check was then returned to them and they could then go to the bath house and bathe and change out of their working clothes.

While riding on the skips the men are subject to the rules and discipline of the company. They are instructed not to push or to have any rough play in the skip and to keep their heads below the top and not stick their heads up suddenly (R. 974). They are not allowed to push or shove before getting into the skip (R. 1040). No smoking is allowed (R. 3229). The first two rules of the Tennessee Company deal with riding on skips (R. 2380).

NO FACE TO FACE BASIS OF PAYMENT

The attorney for the Tennessee Company has argued that the men were paid on a "face-to-face basis." That statement is inaccurate and necessitates an examination of the system used by the company in keeping time and paying wages. Mr. Ball, General Superintendent, testified as follows:

> "Q. Now, I don't quite understand that, quite, Mr. Ball. You say it always shows 8 hours. Would that mean if he stayed there 6 hours it would still show 8 hours, or if he stayed there 9 it would still show 8 hours?
>
> "A. Yes. They didn't keep an accurate time at the working face, and as the rates of pay and the day's work was computed on an 8-hour basis, he put down 8 hours."—(R. 1024).

Mr. Ewing Carter testified as follows:

> "A. I don't want to get too deep into the accounting department, because I might slip, but as far as I can tell you, the board was checked up

there—the timekeeper checked that board to get a distribution on the places which those crews went in as showing the man was there and what he was assigned to. They had to tie up with that head miner or service foreman's time abstract which had been checked by the mine foreman and which he had turned in the time for that crew.

"Q. That is the foremen under ground?

"A. Yes, sir. The individual foreman of each crew, each production crew, or head timberman or head trackman.

"Q. **That timberman or trackman would get his time abstract up early in the day?**

"A. **Yes, sir.**

"Q. **He didn't wait until the end of the shift to make his time abstract?**

"A. No, he carried it out with him and kept it out with him.

"Q. And when you were keeping these time abstracts, the rule was to show 8 hours? They got credit for 8 hours?

"A. Unless a man had gone out from injury or sickness during a shift it showed 8 hours.

"Q. If a man was there 7½ hours his time abstract showed 8 hours?

"A. Unless he was sent away."

At page 789, Vol. 2, Mr. Ball testified:

"Q. According to the practice and custom, did or did not the men or any of them leave their working places before the shooting started?

"A. Yes, sir. As a rule, the section helpers, the drag operator, the men helping on the drills left much earlier than the head miner and the drill runner, who stay to load and place the drill holes.

"Q. About how long before 3:15 would you say they left?

"A. Oh, I would say anywhere around 2:45 to 3 o'clock.

"Q. And when they left where did they go?

"A. They took their time and walked up to the man loading station ready to take the first skip that was going out at the end of the turn."

At page 793, he testified:

"Q. Would those hours work include any part of the traveling time, or did they include only the time he worked at his working place?

"A. Only the time he worked at his working place. It was always shown as 8 hours.

"The COURT: Shown at what?

"The WITNESS: Shown at 8 hours.

"The COURT: Shown at 8 hours?

"Mr. Burr: Yes, sir.

"Q. Would that always be shown at 8 hours irrespective of whether the man left his working place 30 minutes before the 8 hours?

"A. Yes, sir."

As indicative of the lack of accuracy of the contention that the men were paid on a face-to-face basis, it is interesting to compare the 10-hour per day sched-

ule with the so-called 8 hours per day. Mr. Ball testified:

> "A. Oh, it had been in effect ever since we started hauling men in and out of the mines. Of course, at one time they were on a 10-hour basis and that would make the time at which you pulled the men out a little later than on the 8-hour basis. —(R. 790.)

On both the 10-hour day and the 8-hour day the men went into the mine at the same time. (R. 1155, 1198).

TONNAGE OR CONTRACT OR TASK BASIS HAS PREVAILED

Up until 1914 the mines of the Tennessee Company ran on the contract system paying so much a ton. (R. 986-988).

When the contract system was abolished in 1914, the "day pay" system was installed. Rates were established for the drill men, drill helpers and for the muckers. The men would go in and work on a ten hour limit with an assigned task of so many tons. (R. 990, 1250, 1279). Under the task system a man could leave the mine at any time he wanted to after he had accomplished his task. (R. 1251). Some of the men loaded by 10:30 or 11 o'clock and walked out. (R. 1279).

In 1936 the Company put into effect a so-called incentive plan. The men rebelled at the introduction of this plan. A strike resulted. The men lost the strike and went back to work. The incentive plan went into effect.

The incentive plan was, in effect, nothing more than a stretch-out. The number of men on a mining crew was cut down from 9 to 7.

It is difficult to describe the incentive plan. The man who figured it out for the Company was one Joseph Halfpenny, who styled himself a man of Kent, and gave rather curious testimony, beginning at page 1787 and running through page 1824 of Volume 3 of the Record.

At page 1790 we find:

"A. All right. I was asked to approve a straight tonnage rate. I looked into it and found on a fair day's work that tonnage rate would be 22½ cents a ton. **That means if a man or crew mined ten tons they would get paid for ten tons, and if they mined a hundred and fifty tons they would get paid for 150 tons.**

From an industrial engineering standpoint, that was not sound, so I recommended, and it was adopted, that an incentive plan be substituted for the tonnage basis, and instead of paying at the fair day's production of 150 tons per crew 22½ cents per ton, the incentive plan paid at 134—I should have said 168 net tons. It was put in on a gross ton basis. I will think back in net tons now. Instead of paying 22½ cents per net ton, we paid 28 cents per ton for 134 net tons, which was at 80 per cent of the standard."

* * * * * * *

"Q. How did you find out that was the standard.

"A. **That was developed from the studies made which showed about one-half of the eight**

hours work at the face was productive time. As a a matter of fact, the exact figure, I think, was about 4.4 hours. The rest of the time, 3.6 hours, was taken up with delays, with unnecessary things that were done, with overlapping and so forth. There was a nine-man crew. The head miner was boss and didn't work and bossed the crew.

"Q. That was under the old system?

"A. Yes. There were two drill helpers when one was more than sufficient, so automatically the crew necessary was indicated to be seven men.

"At the rate of production by the nine-man crew per man per hour, translated into the 7-man crew, together with the additional unproductive time which was made available for production, the standard began at 168 net tons,—just a simple arithmetical calculation.

"When the incentive plan—I said we paid 28 cents per net ton instead of 22½ cents with the result that with 100 per cent performance of ore production, or 168 tons, the crew got 10 per cent over their occupational rate, which was an evaluated rate for that job for eight hours work on that kind of work.

"When the—from the 100 per cent performance to 120 per cent performance, we paid 25 cents.

"The result was that at 120 per cent performance the curves cross the straight tonnage curve and the percentage curve, and we paid exactly the same in the incentive plan as the tonnage basis of 22½ cents per ton. Up until that time we were paying more on the incentive plan than we would be on a straight tonnage basis, but from then on the company would get their innings, and after

that time it ran below 20 cents as you got to 140 per cent and so on efficiency."

However you analyze the incentive plan, one thing becomes clear, viz: the mines could not be on an hour basis if the quantity of production entered into the rate of pay.

CONTRACTUAL RELATIONS

There is no long history of collective bargaining between the Tennessee Company and any independent union. There was no independent union at the Tennessee Company mines until 1933. The Company refused to recognize that union until October 6, 1938.

The minutes of a meeting on October 19, 1933, between the Company and union representatives, show that the Union suggested that the Company recognize the three locals as labor organizations. The Company made this reply:

> "We are aware of the existence of these various groups, in which may be found some of the employees of this Company; in the same spirit, we are aware of the existence of church groups of various denominations, of fraternal orders of different kinds and of other societies formed for a variety of purposes. Every citizen of the country has a right to belong to any of these, or not to belong as he may elect. It is not our particular concern whether he joins any such group or refrains from joining, so long as his work is performed in an efficient and capable manner."

On April 18, 1934, Union representatives again endeavored to obtain recognition from the company. The

memorandum in evidence as T. C. I. Exhibit No. 7, page 3599, reveals the attitude of the company. We quote in part as follows:

> "Items 1 and 2 ask that the Union be recognized by the Company. If it is intended that you are advising us of the existence of your Union, or any Union, we answer that we are aware of the existence of many Unions, among them being yours. If by this it is intended that we agree to deal with your Union, or any Union as such, we must answer that we will not do so."

On June 13, 1935 the company reiterated its former statement of policy.

Appellant argues that the union was strong enough to shut down the operations of the company on May 4, 1934. The men did go on strike on May 4, 1934. The strike continued until July 2nd or July 4th. They then operated for three or four days and shut down due to lack of orders for materials. At the time of the strike the company had a stock pile of approximately 700,000 tons. (R. 872).

The strike was not settled by any contract between the company and the union. The company did not even condescend to address a letter to the union. Their method of dealing with this new union was to address a letter to the Secretary of Labor. This letter is shown at page 3604 of Volume 5 of the Record. In addition to the name of the addressee, another significant part of the letter is the opening paragraph, which reads:

> "This is to confirm the understanding reached today at the conference between representatives of

the employees of our ore mines and the management."

When the period covered by the letter of understanding to the Secretary of Labor expired in 1935, there was just a continuation of the previous letter. (Record page 881). The union presented a form of contract but the company would not enter into a contract with them. In 1936 the company informed the employees that they were going to put into effect the so-called incentive plan. The men were so strongly opposed to this new plan that they went on strike, but their strike was broken. When it was broken, the company did not enter into a contract with the men.

Whereas in 1934 the company would only condescend to address the Secretary of Labor, in 1936 they used the device of letting the Governor of Alabama issue a statement to the press giving that understanding. By it, the incentive plan was to be given a trial of four months.

It is also significant that the written contract of October 6, 1938 was in part brought about by formal charges preferred against the company before the National Labor Relations Board.

The tactics of the company had succeeded in practically destroying the efforts of the men to maintain the union up until the Fair Labor Standards Act was passed.

"A. It continued to decrease.

"Q. About how many members, prior to this strike in 1936, did you normally have in attendance

at a meeting of your local; that was before the 1936 strike?

* * * * * *

"A. At times we would have one hundred and sometimes it would be up around three hundred or four hundred.

"Q. Now, then, in the year 1936, after the strike was broken, what did the attendance, the average attendance, after the strike was broken amount to?

"A. Well, right after the strike we would sometimes have one hundred members, and then on as we continued on why it dropped down to as low as twenty-five members.

"Q. Was that in '36 it did that?

"A. Well, it goes on into '37.

"Q. In '37. What was it during '37, was the average attendance at the union meetings of your local?

"A. Well, the average attendance would be around ten.

"Q. Around ten. And now, then, after the Fair Labor Standards Act went into effect in 1938 did the membership attendance at your local start increasing, or did it continue as it was in '37?

"A. After the settlement of the undesirables our membership started increasing in '38. (R. 2412, 2413).

STATEMENT OF THE CASE AS TO THE SLOSS COMPANY

The methods of operation in all ore mines of the different companies are fundamentally the same.

Some differences, however, are to be noted between the Sloss operations and the Tennessee Company operations. For example, the Sloss Company did not use brass checks with which the men checked in at the beginning of the shift. A Sloss Company man checked in at the mouth of the mine by reporting to a supervisor, "I am here" or words to that effect. (R. 1798).

The Sloss Company did not use ore cars for mantrips. They had specially constructed cars and up to May 1, 1941 hauled six cars of ten men per car on each mantrip. After May 1st they hauled eight cars. The hauling of the men had to wait upon the hauling of the ore at the end of the shift. (R. 2950, 2951).

The Company kept a man at the top to supervise the loading of the men onto the mantrips and there was a man at the hoodlum or man loading station for the same purpose. (R. 2864). This man determined whether or not they had a full load. (R. 2883). The Company had full supervision over the mantrips. (R. 4550).

The men were not required to get on any particular mantrip but, "if a man didn't catch the last trip they didn't run a special trip. The foreman would tell him to go home and come back the next day and he would miss a shift." (R. 2930).

The underground employees at Sloss took with them into the mine from time to time the following articles: drill needles or some small repair part for a drill (R. 1309); oil (R. 1314 and 1424); wedges (R. 1315 and 1426); bits for drills (R. 1439); picks, shovels, hammers, shovel handles, pick handles and hammer handles (R. 2804 and 2805); Stillson wrenches which they bought outside (R. 2806); dynamite (R. 2808); dynamite caps (R. 2810); steel (R. 2811); drill, air hose, water hose, shovels, picks and hammers (R. 2844); bits and fuses, dynamite caps, and things of the kind they had to work with during the day (R. 2960).

The lighting system at one of the Sloss mines was with carbide lamps and at the other mine was with electric battery lamps. The batteries weighed from six to eight pounds. The company made a charge for the use of the batteries. Each man who went down into the mine had to carry his own lamp.

There was no lunch period at the Sloss Company mines. (R. 2868, 2869).

The Sloss mines were not run on a time basis. There was no method of keeping time. (R. 2826, 1513, 1378). At no time prior to May 1, 1941 did a Sloss employee report at the end of a shift that he had finished that shift.

HOURS UNDERGROUND

Up to 1934 the men were working at least ten hours a day, and in 1934 came down to nine hours. (R. 2902). On the ten hour system the men entered the mine the

same time they did on the other system and on the so-called eight hour system they shot at 3:10 in the afternoon; whereas on the so-called ten hour system, they shot at 4 o'clock. (R. 2903). The men went in at 6 o'clock and got out at from 3:30 to 4 o'clock (R. 2916-17). This system continued until they went on the portal-to-portal basis. (R. 2917, 2962).

METHODS OF PAYMENT

The Sloss Company never paid its mine workers on a time basis before May 1, 1941. The contract system was in effect for a time and then the tonnage system. (R. 1380-1381, 1517).

COLLECTIVE BARGAINING!

The first contract ever signed by the Sloss Company with the union as such was in 1939. (R. 3804). During all the prior years of its operations the Sloss Company refused to deal with the union as an organization. The union proposed contracts in 1934 (R. 3751), again in 1935 (R. 3755), again in 1936 (R. 3763). No action was taken on these proposals.

On July 21, 1936 the company did condescend to address a communication, not to the union, but to the employees of Sloss Red Ore mines. In 1937 the company still refused to recognize the union as such but did sign an agreement with employee representatives. (R. 3782-3785). The same thing happened in September 1938 (R. 3796). In that year the union submitted a proposed contract which the company would not sign. (R. 3796-3803).

On the expiration of the contract which was entered into in 1939, which first recognized the union, the union submitted a contract which contained the specific provision that working time should mean 8 hours including the time spent in entering and leaving the mine.

The attitude of the company toward the union is clearly revealed in the settlement of the strike in 1934. When that strike was settled as a result of the efforts of the representative of the Secretary of Labor, the company would not even address a communication to the union. It followed the same method used by all the other companies and addressed a letter of understanding to Mr. Richardson or the Secretary of Labor. (R. 3861). In 1935 the letter of understanding was continued in effect for one year.

It is absurd to argue in the light of this record, that there was any long history of collective bargaining between the union and the company. It is to be noted that no contract was ever signed with an independent union by either the Tennessee Company or the Sloss Company until after the enactment of the Fair Labor Standards Act.

STATEMENT OF FACTS AS TO THE REPUBLIC COMPANY

At the Raimund mine of the Republic Company the men begin going underground at 5:30 in the morning and come out as late as 4:30 in the afternoon. At the number 2 mine the distance from the mouth of the mine to the face of the seam is 12,675 feet. The distance is so great that the company uses auxiliary conveyances

to help the men coming out of the mine. The men ride about 2300 feet on this auxiliary mantrip. However, the men sometimes have had to wait as high as 35 or 40 minutes before the mine cars had finished their run and could be used to haul them. Their walking distance underground is approximately two miles.

The ore bed at the Republic Mine seems to roll and pitch more than it does in the mines of the other companies. At one place the men had to walk the grade was so steep that they had to pull themselves up by cable. Later the company put 107 steps there with a rise of about 8 inches to the step, and at least 100 men on each shift had to climb those steps. There is another place in the mine where the men had to climb 32 steps.

On their way in men picked up oil, various small tools; "he might pick up a wrench or wedge; he picks up his detachable bits at the steel shop as he goes in, (1862) shovels, and picks and rock hammers, (3032) drills, wedges, hangers and drill bits" (3033).

The employees of Republic use electric lights, battery lights. The Company rents them two types of lamps, one at six cents a day and one at eight cents a day. The lamp and battery weigh about seven pounds. The men wear a belt with a strap on it, and a hook on the back of the battery that the strap goes through, and they buckle them around them (3024).

The manskip at Republic is different from the manskip at any other mine. The slope of the mine is so steep that means must be afforded to keep the men

from being crushed in the skip. The skip is 12 feet long, 4½ feet wide and 4½ feet deep, inside dimensions. Bars made out of pipe run across the skip to form four separate compartments. These bars are necessary to keep the men from being crushed by other men as the cars go down steep slopes which vary from 25 to 50 degrees. The pressure was so great that a Mr. Eady got a couple of his ribs broken. (R. 3029). The slope is so steep that the floor of the skip has lattice work on it so that the floor becomes a ladder onto which the men can hold when going down places 50 to 52½ degrees. (R. 1921-1923).

On May 1, 1941 when portal-to-portal went into effect, the company started using a skip with a top on it so that the men would not have their heads crushed.

In this case, as in the Tennessee Company case, the danger of riding in the skips was forcibly brought home to the court by a man getting injured in the skip while the trial was in progress. (R. 1917).

The Company supervises the loading of the skips and counts the men in and out. No distinction is made between service men and production men as to this control. (R. 3081, 3088, 3030, 3091).

The Republic Company paid its drill crews strictly on a tonnage basis. (R. 3040, 3072-3073).

CONTRACTUAL RELATIONS

The Republic Company had never made a contract with the International Union of Mine, Mill & Smelter Workers up to the trial in the court below. (R. 1899).

No bargaining has ever been effective with the Republic Company. While it would not deal with the independent union, it fostered a company union, as did the Tennessee Company. The Smelter's Union filed charges against the Republic Company before the National Labor Relations Board "Charging Failure to Bargain Collectively, and Acts of Discrimination in Reference to Discharges or Refusal to Re-employ Certain Employees and the Domination of an Alleged Company Union." (R. 4593).

When the Smelter's Union was organized in 1933 and addressed a letter to the Republic Company, that company did not deign to answer the letter. When the strike was composed in 1934 it followed the same haughty scheme as the other companies and addressed a letter of understanding to the Secretary of Labor.

SUMMARY OF THE ARGUMENT

1. Section 7 of the Fair Labor Standards Act of 1938 provides that no employer shall employ any of his employees, who is engaged in commerce or in the production of goods for commerce, for a work week longer than the stated number of hours, unless such employee receives compensation for his employment in excess of the stated hours at a rate not less than one and one-half times the regular rate at which he is employed. Employ is defined, "To include to suffer or permit to work."

The statutory requirement is clear, simple and absolute. If the employee works more than the stated hours he must be paid for the excess time at rate and

one half. No opening is left whereby the employer, through artifice, stratagem, clever devices or power over his employees may avoid the required payment.

2. The underground employees of the petitioners were at work from the time they were required to report and did report for work at the portal of the mine until they returned to the portal of the mine at the end of the shift, less the regular lunch period when they were relieved of all duties. This working time comprised the work-week. At the time the employees reported at the portal they had surrendered their will to the will of the master. They were then and there subject to his direction, supervision and control. They were expending energy in his behalf to accomplish his purposes in mining ore. They were not engaged in recreation or pleasure. The things that they were doing were absolutely necessary to the production of ore. Those things required effort and alertness. They subjected the workmen to fatigue, unpleasant conditions and serious dangers.

3. The underground employees have not been paid for the hours they worked in excess of the statutory limits. They have not been paid on a face to face basis. A tonnage system, a task system or a stretch-out (incentive plan) has determined their pay.

4. There has been no long history of bona fide collective bargaining in the iron ore mines of the petitioners. Republic had never made any contract whatsoever up to the time of the trial. The Tennessee Company and Sloss made no contract with the Smelter's

Union until after the enactment of the Fair Labor Standards Act.

Contracts, whether made before or after the passage of the Fair Labor Standards Act, cannot take the transactions "from the reach of dominant constitutional power".

The record in this case gives a graphic picture of futile efforts by weak unions to bargain collectively with powerful employers. Those efforts were treated with high disdain. The unions were crippled, almost destroyed. The leaders became "undesirables." It took an exercise of dominant constitutional power to get recognition of the independent union by two of the petitioners prior to the trial below. It took a judicial interpretation of that exercise to get union recognition by the three petitioners.

5. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

If express agreements voluntarily made, are ineffective to deprive an employee of the benefits of the Fair Labor Standards Act then *a fortiori* a custom against which the employee rebels cannot deprive him of those benefits.

6. The intention of Congress is declared in Section 2 of the Fair Labor Standards Act. The declaration reads:

> "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum

standard of living necessary for health, efficiency, and general wellbeing of workers."

Section b then provides:

> "It is hereby declared to be the policy of sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

The method used by Congress in the Act was the establishment of minimum wages and maximum hours. It is just as important to pay a man for all the time he works as it is to pay him minimum wages. No condition can be more detrimental to labor than for the laborers to do work and get no pay for that work.

7. Whether or not a man is at work is a question of fact. When a question of fact is decided by a trial court without a jury, that decision has the effect of a jury verdict. The Acts of Congress, the Federal Rules of Civil Procedure and the uniform course of judicial history establish this principle.

ARGUMENT

This case concerns underground employees. It does not concern surface workers. The underground employees are not coal miners. They mine iron ore. We did not try out in the Courts below the claims and counter claims of the United Mine Workers of America and the coal operators. We do not see how we can try

the issues between coal miners and coal operators on a record protraying the work, the environment and the detailed conditions in the iron mining industry. The judicial process applies to specific cases between designated parties. The trial judge hears the evidence offered by those parties and makes his findings thereon. The controversy thus delimited is the one which goes up for review by the appellate court under our American system of jurisprudence.

The question in this case is extremely simple. Were the underground ore mining employees of the appellant at work more than the maximum number of hours specified in the Fair Labor Standards Act? If they worked in excess of the hours specified in the act they have not been paid as required by the act. Nobody claims that the employees have been paid for all of the time and energies they expended between checking in and checking out as employees of the appellant.

The case, therefore, hinges on a matter of simple fact.

EMPLOYEES WERE AT WORK FROM PORTAL TO PORTAL

The Fair Labor Standards Act does not give a definition of work. We respectfully submit that no definition of work by the Congress was necessary. The word has had a long history in the language. The average man understands what the word means. Few people would have any difficulty in deciding whether they were at work or not at work at a particular time.

It should be borne in mind that Congress, in enacting the Fair Labor Standards Act, was legislating for the entire United States and for all industries engaged in interstate commerce or in the production of goods for interstate commerce. It would have been impossible, in our judgment, to enact a law giving specific definitions for each separate industry in the multitudinous industries of our national economy. No simpler word could have been found than the word "work". When a thing has been reduced to its elements, the process of analysis is exhausted.

Webster gives the primary meaning of the verb in the following language:

> "To exert one's self physically or mentally for a purpose, esp., in common speech, to exert one's self thus in doing something undertaken chiefly for gain, for improvement in one's material, intellectual, or physical condition, or under compulsion of any kind, as distinguished from something undertaken primarily for pleasure, sport or immediate gratification, or as merely incidental to other activities (as a disagreeable walk involved in going to see a friend, or the packing of a trunk for a pleasure trip); as, he works harder at his play than at his work; he has devoted his time to polo, mountain climbing, and hunting, and he has never really worked in his life."

The Supreme Court of Louisiana in *State* v. *Rose*, 125 La. 462 (51 Sou. Rep. 496), uses this language:

> "The word "work" has a much more comprehensive meaning than the term "labor", and has been thus defined:

"To exert one's self for a purpose, to put forth effort for the attainment of an object; to be engaged in the performance of a task, duty or the like." See Webster's Int. Dict. verbo.

"The term as thus defined covers all forms of physical or mental exertions, or both combined, for the attainment of some object other than recreation or amusement."

Other definitions of work are to be found in *Reese* v. *Sanitary District of Chicago*, 272 Ill. App. 315; *Kary* v. *North Dakota Compensation Bureau*, 67 N. D. 334; *Republic Tool and Manufacturing Co.* vs. *Lenarz*, 17 Ohio App. 500, 501, 502.

The essential facts in this case are not in dispute. The defendants checked in around 6 o'clock in the morning. The timetaker hung up their checks. He was stationed at the tally house. While the men were checking in and before they entered the skip, they received orders and instructions from their superiors. At all times from the check in until the check out, they were under the supervision of their superiors in the employment of the Tennessee company. They were under the rules of the company and subject to the discipline of the company. The representatives of the company counted them into the skips on the way down, and counted them out of the hoodlums into the skips on their way out.

Immediately upon leaving the bath house at the beginning of a shift, the men busied themselves about their occupations. Immediately they began to render service to the company. The Fair Labor Standards Act of 1938 does not require that the men be engaged in productive work. It

applies to work, whether that work is productive, administrative, preliminary, maintenance or salvage.

For illustration, let us assume that the Tennessee company decided to install an electric lighting system throughout the length and depth of its mines. No man would question the fact that men who were engaged in stringing the wire, putting in the light connections and inserting the electric light bulbs, were engaged in work. In the instant case, the Tennessee company does not use electric lighting throughout the length and depth of its mines. Yet a lighting system is absolutely necessary. No man can work in the bowels of the earth unless he has a light. From the time the men check in at the tally house and get the one pound can of carbide, they are engaged in furnishing a lighting system for their employer. Instead of stringing wire which will carry a current manufactured elsewhere, they carry along with them the chemical ingredients which will produce a light that accompanies them wherever they go. To be sure, it is not arduous labor to wear a lamp on one's head and carry a one pound can on one's belt, however, work does not have to be arduous in order to be compensable. Some forms of work are pleasant.

Would any reasonable man contend that the maximum hours of labor prescribed in the Act would only apply to arduous work. If so, how arduous? Who would determine whether work was arduous or not? Chopping wood is a pleasant exercise to an expert axeman, and yet it is back breaking labor to the average man.

The defendants carried various tools, materials and supplies from the mouth of the mine, or the man unloading station, to the face of the ore. We have already listed the

articles they carried. Each and every tool and piece of equipment was carried for the sole purpose of furthering the business of the Tennessee company. No single piece of equipment was carried for the individual pleasure of the bearer. Every piece of equipment and all supplies were necessary to the mining of iron ore. It is true the men carried more down into the mine than they brought out of the mine. They couldn't bring out those things that were consumed. They brought out bars, hangers, oil cans and jackhammer steel.

The ride in the skips covered only a part of their journey from the portal to the face. The skips went down to the man unloading station at the foot of the slope. The construction of the skips, the condition thereof, the overcrowding of the men, the crouching and cramped positions the men were compelled to assume, embracing one another's bodies, bracing themselves to avoid being crushed, holding their heads bowed in order to avoid the rollers and low places in the roof, robbed the ride in the skip of every element of pleasure, unless one considers danger as an element of pleasure.

Then, when the men got off at the man unloading station, those who were carrying steel had to guard themselves against electrocution, all had to guard themselves against the slippery places, the muck covered places and the passing cars in the mine. All were subjected to the ever-present danger of falling slate or rock. Some of them walked a distance of 4,000 feet (R. 1077); 4,900 feet, 6050 feet, (R. 1663); 3,000 feet (R. 2403); about a mile (R. 2696); or others "around twenty minutes peart walk" (R. 2747). This journey was in humid and malodorous air. None but a fool would call it a pleasure promenade.

The witness, Halfpenny, testified that he evaluated the pay scale in the incentive plan by taking into account certain factors. Witness this paragraph at page 1793 of the Record:

> "Then there is a question of the surroundings, the hazards of the job, the conditions of the job, whether it is wet or dry, or dusty or hot or cold, or whatever it may be, and then there is the physical effort required, and then on top of that, there is an element known as fatigue, which is a combination of mental effort, physical effort and the amount of work which is done."

Every single element which this company witness considered in figuring the compensation of the men, is found in the journey from the portal to the face and back again. Yet the company would excuse itself from complying with an Act of Congress because it had disregarded the very element on which they calculated the pay they would give the men.

WORK INCLUDES TRAVEL TIME

Travel time has been held to be work time by the District Court in the case of Sunshine Mining Co. vs. Carver, 41 F. Supp. 60. At page 66 we find this language:

> "First, should the time spent in travel from the portal of the mine and descending to the usual place of work and returning to the portal be included in "hours worked"? The answer under the evidence should be in the affirmative for the place designated at the portal of the mine on its premises is the place where the workmen are to appear at a specified time.

> The workman offers himself there at a specified time and is under the control and direction of plaintiff who agrees to designate the place of work and the manner provided by it and who created the situation necessary in operating its mine."

The Supreme Court of Montana construed the Montana eight hour law as calling for a "portal to portal" basis of payment. See *Butte Miners' Union No. 1* v. *Anaconda Copper Min. Co.*, 112 Mont. 418, (118 P. (2nd) 148).

It has also been held that travel time was a part of the work time in the case of *Hackworth* v. *Caddo River Lbr. Co.*, 4 Wage Hour Rept. 458 (W. D. Ark. 1941). In the case of *Sirmon v. Cron & Gracey Drilling Coorporation*, 44 F. Supp. 29, the District Court held that the employee was entitled to pay for travel time "where there are special circumstances creating a situation beyond his control, and which is for the convenience or interest of his employer."

Preliminary activities came before the Court in the case of *Davies* v. *City of Seattle*, 67 Wash. 532, 534; 121 Pac. 987. Teamsters spent about an hour a day in going to and returning from their job. They greased their wagons, hitched up their teams and collected tools when that was necessary. The Supreme Court of Washington held that such activities were included within the prohibition of the law. The Court says:

> *"there could not be two opinions as to whether the respondents were working more than eight hours a day. If the excess time put in by respondents was not work, then the inquiry is, what is work and where is the dividing line? (Italics supplied)."*

In Williams v. Atlantic Coast Line R. Co. No. 26 E. D. N. C., decided February 17, 1940, Judge Meekins held that maintenance-of-way employees were entitled to pay for the time spent in travelling from the place where they reported for work to the place on the right-of-way to be repaired.

Section 2 of the Federal Hours of Service Act (see 2939, 34 Stat. 1415, 45 U.S.C. Section 61) provides in part:

> "it shall be unlawful for any common carrier * * * to require or permit any employee * * * to be or remain on duty for a longer period than sixteen consecutive hours * * * *Provided*, That no operator, train dispatcher or other employee * * * shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period * * *"

The Act was construed in *Missouri, K & T. Ry. Co. vs. United States*, 231 U.S. 112, 119. The question was whether the employees had been on continuous duty. Mr. Justice Holmes, writing for the Court, said:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and if it be deducted, they were not kept more than sixteen hours. *But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. (Italics supplied.)*"

Men were held to be on duty while rendering preliminary services in the case of *U. S.* v, *Denver & R. G. R. R. Co.*, 197 Fed. 629. The opinion contains this language:

> "Labor does not cease to be such because not paid for, nor does duty cease to exist because performed without compensation in connection with duty for which there was compensation."

See also, United States v. Illinois Cent. R. R. Co., 180 Fed. 630 (N. D. Iowa); *San Pedro, L. A. & S. L. R. R. Co.* v. *United States,* 213 Fed. 326, 329 (C. C. A. 8).

In the case of *United States* v. *Chicago, M. & P. S. Ry. Co.,* 195 Fed. 783 (W. D. Wash.), an hours of service case, the Court held at page 785:

> "An employee is on duty when he is at his post in obedience to rules or requirements of his superior, and ready and willing to work whether actually at work or waiting for orders or for the removal of hindrances from any cause."

Other cases holding that men are on duty when they become subject to the orders of the employer are as follows: *United States* v. *St. Louis S. W. Ry. Co. of Texas,* 189 Fed. 954 (W. D. Tex.), affirmed 199 Fed. 990 (C. C. A. 5); *Minneapolis & St. L. R. R. Co.* v. *United States,* 245 Fed. 60, 64 (C.C.A. 8), certiorari denied 245 U. S. 666; *Chicago, R. I. & P. Ry. Co.* v. *United States,* 253 Fed. 555 (C.C.A. 8); *United States* v. *Pitcairn,* 23 F. Supp. 242 (E. D. Mo.)

The argument of petitioners is based upon the assumption that work must be productive work or effective work.

What is productive work? Is maintenance productive work? If it isn't then none of the service employees, although they had been paid by the Tennessee Company for

years, were ever at work for the Tennessee company. Where does production begin? Does it begin when the drill begins to bite into the ore, or when the dynamite charge is packed in the drill hole, or does it begin only when the explosive force of the dynamite expels the ore from its bed? Isn't it as plain as day that every step and every movement from the time the men leave the tally house until the time they return, is directed toward the production of ore?

WHAT IS EFFECTIVE WORK?

Effective to what purpose? Every step and every movement, every ounce of energy expended by these defendants from the time they left the tally house until they returned, had an effect on the production of ore. Even their return trip was effective because it enabled the human bodies to subsist and return again. If they had remained in the mine they would have perished and new men would have had to take their places. Their outward journey was, therefore, effective in keeping down a labor turnover. It was effective in the same sense that the care and preservation of equipment is effective work. It is just as important to preserve the man as it is the machine.

The decisions under the Fair Labor Standards Act have not required that employees be engaged in productive activities. See *Fleming* v. *North Georgia Mfg. Co.*, 33 F. Supp. 1005 (N.D. Ga.); *Reck v. Zarnocay*, 33 N. Y. S. (2nd) 582 (Sup. Ct. N. Y., N. Y. Co. 1941); *Travis* v. *Ray*, 41 F. Supp. 6; *Walling* v. *Sun Pub. Co.*, 47 F. Supp. 180, 191; *Walling* v. *Dunbar Transfer and Storage, Inc.*, No. 464, decided on January 22, 1943 by the Western District of Tennessee.

Section 3J of the Fair Labor Standards Act contains this language:

> "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Counsel for the Tennessee Company seem to fear that an affirmance of the opinion of the Court below will disrupt American business. Two considerations show that this fear is not justified. First, all the petitioners have been operating on a portal to portal basis since May 1, 1941. Second, this case deals with underground employees. Travel time underground and travel time on the surface are two very different things. The mining laws of many states reveal a general consciousness of the dangers to underground mine workers. The difference between such workers and surface workers is recognized in the opinion in *Holden* v. *Hardy*, 169 U.S. 366, 396.

We, therefore, are unable to foresee any catastrophe. It is our opinion that the District Court was correct in holding that the work time began when the men checked in at the tally house. The Circuit Court of Appeals eliminated the period from the check-in until the arrival at the portal. Evidently, the Circuit Court of Appeals had in mind the fundamental difference between underground travel and surface travel. We did not complain of this ruling of the Circuit Court of Appeals because the time involved was inconsequential. However, we believe that the work begins when the employee checks in, surrenders his

own will and becomes subject to the direction, supervision and control of the employer. Such a rule would not disrupt American business. The time involved is of no great moment. If there are exceptional cases in surface work where men check in and walk great distances, those cases could easily be remedied by letting the men check in at a point closer to their machines. In any event, a surface worker cannot successfully maintain a claim that travel on the surface requires the arduous effort or subjects the traveller to the many dangers incident to travel underground.

NO FACE TO FACE METHOD OF PAYMENT

The true facts with reference to the basis of compensation have been accurately set forth in the findings of fact of the District Judge. Paragraphs 8 to 12 of those findings on pages 558 and 559 of the Record give such a clear picture that they need little elaboration. At the Tennessee Company a man's time sheet would show eight hours if he stayed at the face only six hours. No accurate record of time at the working face was kept. His time was taken and he was given credit for an eight hour shift before the time had passed. The time taker would make up his time abstract early in the day. An illustration of the small part time played in the general scheme is found in the fact that there was only a fifty minute difference between the shooting time on a ten hour day and on an eight hour day. Yet the men went into the mine at the same time.

Finally, let us consider the incentive plan. This peculiar plan was predicated upon this statement:

"If a man or crew mined 10 tons they would get paid for 10 tons, and if they mined 150 tons they would get paid for 150 tons. From an industrial engineering standpoint, that was not sound."

That statement is one of the most peculiar statements I ever heard in my life. How could it be unsound for a man to get paid for what he did? It is clear that the incentive plan was designed to prevent a diligent man from getting full pay for what he produced. The company, under this plan, set each man a task and gave him a guaranteed wage. If he produced more than that task he got additional pay, but the more he produced the less his rate of pay became. In other words, all the men were on a tonnage basis under the incentive plan, but they could not get the full benefit of their additional tonnage under this plan. The incentive plan was in effect at all times from October 24, 1938 to May 1, 1941.

We respectfully submit, that the evidence not only abundantly supports the findings of the District Judge, but compels such findings.

COLLECTIVE BARGAINING

It is difficult for us to understand how the petitioners can base any claim upon a theory of collective bargaining over any long period of time. They have fought the unions since the men first attempted to organize an independent union. We cannot describe the attitude of the Tennessee Company any better than they did for themselves in answer to the suggestion that the company recognize the union. We refer the Court to the quotation at page 3591 of the Record. In 1934 the company stated, "If by this it is in-

tended that we agree to deal with your union, or any union as such, we must answer that we will not do so." (R.3599).

How can any reasonable man claim that he was engaged in collective bargaining with employees when he wouldn't even address a letter to the employees. Their scheme of addressing communications to the Secretary of Labor shows how far the petitioners were willing to go before they would recognize the existence of the unions. Union representatives were so odious in the sight of the petitioners that they called them representatives of employees.

Each time the men tried to accomplish something by a strike they were defeated. The strike in 1934 has a peculiar element about it. It began on May 4th and ended about July 4th. The company operated for 3 or 4 days then shut down for lack of orders. Evidently the strike was exactly in line with the desires of the company. It had a stock pile of approximately 700,000 tons at the time. (R. 872).

During 1936 one of the locals had about 10 working members and in 1937 about 5. (R. 2553). The leaders of the unions were designated as undesirables.

If there had been any genuine collective bargaining, why was it that no contract was ever signed with the union prior to the enactment of the Fair Labor Standards Act?

NO CONTRACT CAN DEFEAT THE WILL OF CONGRESS

Mr. Chief Justice Hughes expressed the basic rule in the case of *Norman* v. *B. & O. R. Co.* 294 U. S. 240 at 307:

> "Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. See *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357."

In the recent case of *Overnight Motor Transportation Co., Inc.* v. *Missel*, 316 U. S. 572, Mr. Justice Reed, speaking for the Court, used this language:

> "If overtime pay may have this effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions 'from the reach of dominant constitutional power.'"

Petitioners' complain of the overtime compensation provision of the law as if it were a great injustice to them. Such complaints were made in the Missel case. This Court answered the complaint in these words:

> "Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute, and he was no more at fault than the employer."

The Circuit Court of Appeals for the 8th Circuit in the case of *Johnson* v. *Dierks Lumber & Coal Co.*, 130 Fed. 2nd 115, uses this powerful language:

> "We do not think the act means that an employer may claim all of an employee's time and compensate

him for only a part of it. An agreement to pay for only a part of the hours which an employee is required to serve is invalid. The purposes of Congress in enacting the statute cannot be thus frustrated. See Missouri, K. & T. Ry. Co. v. United States, 231 U. S. 112, 119, 34 S. Ct. 26, 58 L. Ed. 144; Chicago, R. I. & P. Ry. Co. v. United States, 8 Cir., 253 F. 555; Travis v. Ray, D. C. Ky., 41 F. Supp. 6, 8; Northern Pacific Ry. Co. v. United States, 9 Cir., 220 F. 108, 110; United States v. Southern Pac. Co., 9 Cir., 245 F. 722, 725."

The public policy declared by the Act is not to be thwarted by any private agreement. No employer can take the benefit of contracts, the effect of which would be to infringe the rights guaranteed by the Fair Labor Standards Act. This principle has been clearly enunciated by this Court in a case arising under the National Labor Relations Act. See *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 364-367.

Counsel suggested that travel time should be within the permissable area for collective bargaining. Congress never intended that private parties could make arrangements whereby the maximum hours provision of the Act could be avoided. The language of Congress is too clear to require any aids to interpretation. If the employee works more than 40 hours he must be paid at the statutory rate.

If a man is at work, no agreement to call that work something else will prevent it from being work. The essential nature of his activities determine whether he is at work. The name is not important. If the parties, by private agreement, can say that activities which are really work are not work, what will the limit be? If they can

agree that travel time is not work, can't they agree that the first two hours of activity at the face are warming-up exercises or practice and not work? Once the test is placed in the power of the parties, the will of Congress is nullified. The effort of the Congress to carry out the purpose described in the preamble of the Act will become lost in a maze of private agreements. Everywhere in the United States employers will be using pressure to make agreements defining work as something else. Surely Congress never intended that what it said could be brushed aside and the rule be whatever the individual contracting parties said.

CONSTRUCTION OF THE ACT

It has been uniformly held that the Fair Labor Standards Act should be liberally construed. See *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128, 132; *Fleming* v. *American Trust Co.*, 42 F. Supp. 511; *Bowie* v. *Gonzalez*, 117 F. 2nd 11.

Where the language of a statute is clear and certain and there is no ambiguity, there is no occasion for the use of extrinsic aids to its construction. See *Caminetti* v. *United States*, 242 U.S. 470, 480; *MacKenzie* v. *Hare*, 239 U. S. 299, 308.

The province of construction by means of custom or other extrinsic circumstances, thus "lies wholly within the domain of ambiguity." *Hamilton* v. *Rathbone*, 175 U.S. 414, 421, and where the statute is free of ambiguity, it cannot be construed to permit a practice even where it has grown up in good faith long before the statute was enacted. *Louisville & Nashville Railroad Co.*, v. *U. S.*, 282 U.S. 740, 759.

TRIAL BY JUDGE WITHOUT A JURY

The findings of a trial judge have the same weight as the verdict of a jury. Mr. Justice Field has stated that where a case is tried by the Court without a jury, its findings upon questions of fact are conclusive. See *Stanley* v. *Supervisors of Albany*, 121 U.S. 535 at 547. It has also been held that alleged errors in the findings of fact are not subject to revision, "if there was any evidence upon which such findings could be made." See *Hathaway* v. *Cambridge National Bank*, 134 U.S. 494, 498; *Dooley* v. *Pease*, 180 U. S. 126, 131; *Brooks* v. *Willcuts*, 78 Fed. 2nd. 270; *Gideon-Anderson L. Co.* vs. *St. Louis Southwestern Ry. Co.*, 88 F. 2nd 232; *Union Bleachery* v. *United States*, 79 F. 2nd 549 at 550.

Rule 52 of the Rules of Civil Procedure provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Section 773 of Title 28, Judicial Code, U.S.C.A. expressly provides that the findings of the Court upon the facts shall have the same effect as the verdict of a jury.

THE COAL SITUATION

Counsel for the Tennessee Company have argued the case of the coal operators to such an extent that we feel compelled to say a word on that subject.

The War Labor Board has recognized that travel time is work time. The Ickes-Lewis Agreement of November 3, 1943 recognizes travel time as work time. About 70 per cent of the coal tonnage of the United States signed an agreement with the United Mine Workers of America on December 17, 1943 recognizing that travel time is work time. We are informed that the captive mines, which include the petitioners, are signatories to that agreement. That agreement provides for a $40 payment for all miners employed from April 1, 1943 to June 20, 1943 and a pro rata payment of that amount for those who were not employed that full period. The agreement settles all portal to portal problems of the signatories up to and including March 31, 1945. All suits on portal to portal are to be dismissed.

Since iron ore miners have been paid portal to portal from May 1, 1941 and since coal miners, by the agreement of December 17, 1943, will get such payment from April 1, 1943, it now appears, at long last, that miners in enlightened and crusading America will get hereafter what miners in England and benighted Europe have been getting for so many years. See dissenting opinion of A. F. of L. members of War Labor Board in the Illinois case. (Sept. 7-43)

CONCLUSION

We respectfully submit that a simple factual situation is governed by clear and simple words. A trial judge has heard the evidence and rendered a correct decision. Despite the enormous pressures incident to that decision, the Circuit Court of Appeals has affirmed the District Court. Today those pressures are being lifted by private agreement. Whether or not those agreements remove the pressure, the intent of Congress so clearly expressed should be respected. Men who work more than 40 hours in any work week should be paid for the excess at one and one-half times their regular rate of pay. The decision of the Court below should be affirmed.

Crampton Harris

CRAMPTON HARRIS

J. Q. Smith

J. Q. SMITH

The undersigned, of counsel for respondents affiliated with the C.I.O., hereby certifies that a printed copy of this brief has this day been served upon Mr. Borden Burr, of counsel for the Tennessee Coal, Iron & Railroad Co., another copy upon Mr. Borden Burr, of counsel for Republic Steel Corporation, and a copy has been served upon Mr. E. L. Ali, of counsel for Sloss, Sheffield Steel & Iron Company, and a copy upon Miss Bessie Margolin, Assistant Solicitor, U. S. Department of Labor, and a copy upon the Solicitor General of the United States, Washington, D. C.

This the 27 day of December, 1943.

Crampton Harris

CRAMPTON HARRIS

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):

Section 3 (g):

"Employ" includes to suffer or permit to work.

Section 3 (j):

"Produced" means p r o d u c e d, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Section 7 (a):

No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 773. Same; by court. Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. (R.S. Sec. 649), 28 U.S.C.A. Sec. 773.

NATIONAL WAR LABOR BOARD

In the Matter of:

THE ILLINOIS COAL OPERATORS ASSOCIATION

and

THE INT'L UNION, UNITED MINE WORKERS OF AMERICA

and

DISTRICT NO. 12, UNITED MINE WORKERS OF AMERICA

Case No. 11-237
September 7, 1943

DISSENTING OPINION OF AFL MEMBERS

Portal to Portal Pay

The heart of this whole problem is clear. A mine worker is at work from the time he reports for work, at the beginning of the shift, and comes under the control, direction or supervision of his employer until the end of the shift, when he leaves the control, direction or supervision of his employer. He is at work at all points of his journey from the portal to the face and back again. He is undergoing inconveniences and suffering great hazards. He is at work. He is not paid for that work. He has never been paid for that work.

Ore miners also undergo the same inconveniences and dangers. (They do not face the gas explosions such

as killed 21 persons in Alabama on August 28, 1943.) But ore miners get paid. Some of them have been getting pay since May 1, 1941. Many have been getting pay for a number of years because of legislative enactments. All of the iron ore miners have been getting pay for travel time since December 1942. How is it possible to have two different standards for one and the same thing? Since the ore miners are being paid on a portal-to-portal basis, why not pay the coal miners from portal-to-portal? Why should the majority of the War Labor Board discriminate against the coal miners?

Payment for travel time for miners is a right which exists quite separate and apart from the recent decision in the Tennessee Coal, Iron and Railroad Company case. This decision merely confirms that right; it has focused the attention of the nation upon that right. Neither is payment for travel time dependent upon the Fair Labor Standards Act which deals with "additional" or "extra" or "overtime" rates of pay.

The spokesman for the majority has called the Illinois Wage Agreement a "hidden wage increase" that is "not very well hidden". We can see no wage increase in paying men for work for which they have never been paid at all. Increase necessarily means the recipient has been receiving some pay for the work in question. The mine workers have received no pay at all. How can it be an increase?

Any fair-minded person can easily be convinced that payment of "travel time" is a just request of the coal miners, if he understands what "travel time" really means to the worker. The travel time of a coal miner

is arduous and dangerous. He must crouch down while riding in mine cars and stoop over while walking in order to escape injuries from low roofs. He runs the risk of electrocution from unprotected electric cables and wires. The tracks and passages along which he walks are in many places cluttered with rock and coal; in other places, they are wet and slippery or entirely covered with water. He carries a six pound lamp, his lunch and his drinking water for the day and picks up his sticks of powder and sometimes some of his tools as he goes from the portal to the face. Thus burdened, he walks in a stooped and uncomfortable position for distances varying from a thousand feet to five miles. The air in many of the mines grows more humid and more malodorous the farther he goes under the earth. Why should the majority adopt a ruling that prevents any human being from being compensated for undergoing such inconveniences and dangers? Are we to put the coal miners of America in a class apart and deny them that which we give to others?

On August 25, 1943, the War Labor Board issued a directive requiring pay for travel time in the matter of Atlantic Basin Irons Works, Inc., and Industrial Union of Marine and Shipbuilding Workers of America, Local No. 39, CIO, Case No. 25-29D-10. Would any sensible man argue that the travel time of a shipbuilder even remotely approximated in inconvenience, fatigue and danger the travel time of a coal miner?

It should be noted that payment for travel time of miners in the future is also a right separate and apart from any liability facing the operators in not having

paid for travel time previously rendered even though the operators and mine workers attempted to deal jointly with both of these problems. Failure on the part of the majority members of the Board to recognize a claim for part services rendered in the form of travel time does not absolve the Board of the responsibility of dealing fairly and equitably with both mine workers and operators regarding compensation to be had for future travel time service to be rendered.

In ruling that the agreement cannot be approved on account of insufficient data to indicate just how travel time was or may be calculated the Board has taken an unjust and unwarrantable attitude. It is freely admitted by all concerned that accuracy in computing travel time is most difficult of procurement and that an approximation is the best possible method of settlement.

Because of the arduous and dangerous requirements of travel and of service of miners while underground, prior consideration has been given to this situation by governments generally. The sort of legislation enacted has taken two forms—one limiting the time any miner would be permitted underground, the other requiring payment in wages for time consumed while descending, ascending or traveling underground to the face of the mine.

Direct information on the extent to which payment of wages is based on a portal-to-portal basis is not readily available. We are informed, however, that prior to the current war, New Zealand wages were based on an eight-hour day, bank-to-bank (i.e., portal-

to-portal); in Belgium and in the Dombrova and Cracow areas of Poland, the hours were strictly on an individual portal-to-portal basis, and in France, Czechoslovakia and India, the average time consumed in descending and ascending were included in the hours underground.

We are also advised that in Germany the underground hours included one period of ascent or descent on an individual basis and that in the Netherlands, the Upper Silesian region of Poland and Japan (ascent), the hours included an allowance for the average time of ascent and descent. Neither ascent nor descent was included in the case of Great Britain before the war. Since the war, this has been changed. The miners of Great Britain are now paid on the bank-to-bank (portal-to-portal) basis.

These trends and developments point to the way of humane and considerate treatment of miners while underground.

This Board said that the settlement of the portal-to-portal issue was a matter of negotiation. We refer to the following language of May 25, 1943:

> "Thus, this controversy over portal to portal pay presents a mixed question of law and fact which, in the absence of a specific court determination binding on these parties, can and should be settled by them in collective bargaining.
>
> "It should be recognized by the parties that any agreement reached by them in collective bargaining on this matter must be genuinely and reasonably related to the portal to portal issue, any

such settlement shall be submitted to the War Labor Board with supporting data sufficient to enable the Board to determine whether or not it constitutes a genuine settlement of alleged claims arising under the Fair Labor Standards Act, and not an indirect wage increase in violation of the wage stabilization policies.

"The Board understands that there is considerable variation in portal to portal travel time among the different coal areas in the country. Although the Appalachian area only is before us, it is the practice of outlying areas to a large extent to follow the Appalachian agreement. If the parties in their negotiations choose to negotiate on the basis of area adjustments, then the Board would be able to approve wage adjustments based on travel time in any area on a basis shown to be justified by the facts of that particular area."

The parties met and worked out a compromise. The Illinois Coal Operator Association used one set of figures and gave weight to certain factors. The United Mine Workers of America used different figures and considered different factors. They reached a compromise of a genuine, existing, increasing liability. By a compromise, the miners agreed to take less than many of them will, no doubt, prove in the courts.

Do the words "genuinely and reasonably related to the portal-to-portal issue" give any test at all? Are they not designed to support decisions by a mere matter of attitude—attitude of the members of the War Labor Board? There are no accurate statistics on travel time. There are no recent governmental surveys. No matter what settlement the United Mine Workers of

America may make, the Board can condemn it, if they wish, by the flat assertion that it is not genuine. Would it not be more fair to all concerned, since the majority of this Board has found that this agreement is not genuinely and reasonably related to the portal-to-portal issue, if the majority of the War Labor Board would indicate what are the standards of measurement upon which the operators and miners might proceed and which would satisfy the War Labor Board.

The decision of the Board is entirely negative. It recognizes that the miners have a legal claim to portal-to-portal. It then suggests that they reach an award in the dark. The duty of the Board is to shed light, not darkness.

As we see it, the mine workers have a genuine claim to portal-to-portal pay up to April 1, 1943. We do not see how it is possible to make argument against their claim of portal-to-portal pay since April 1, 1943. The supplemental Wage Agreement of July 20, 1943 is a genuine settlement of a real controversy. It deserves approval. Rejection of the agreement makes confusion worse confounded.

s/George Meany

s/Matthew Woll